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QUESTIONS PRESENTED

1. Whether a non-party witness, appealing a civil contempt order for refusing to produce documents, can challenge the District Court's prior denials of motions to dismiss for lack of subject matter jurisdiction.

2. If so, whether plaintiffs-respondents have standing as clergy members and participants in the political process to challenge the government's unconstitutional and unlawful enforcement of a provision of the Internal Revenue Code.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. 87-416

UNITED STATES CATHOLIC CONFERENCE
and
NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
Petitioners,

- against -

ABORTION RIGHTS MOBILIZATION, INC.,
et al.,

Respondents.

*On a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit*

BRIEF FOR RESPONDENTS
ABORTION RIGHTS MOBILIZATION, INC., et al.

Additional Constitutional Provision Involved

The Establishment Clause of the
First Amendment to the Constitution pro-
vides:

Congress shall make no law respec-
ting an establishment of religion
. . . .

U.S. Const., Amend. I.

Statement of the Case

This case arises from a contempt order issued in an action challenging the government's selective enforcement of the provision of the tax code forbidding partisan political activities by religious and other charitable organizations. Petitioners are two non-party witnesses held in contempt by the District Court (whose ruling was affirmed by the Court of Appeals) for refusing since February 1983 to produce subpoenaed documents while "wilfully misle[ading] the court and the plaintiffs and . . . ma[king] a travesty of the court process." (Pet. App. 44a-45a)¹

Although it is petitioners' refusal to comply with subpoenas that has given

¹/References to "Pet. App. " are to pages in the appendix to the petition for a writ of certiorari. References to "J.A." are to pages in the joint appendix in this Court. References to "C.A. App. A " are to pages in the joint appendix in the Court of Appeals.

rise to the contempt order and this proceeding, petitioners raise no objection to the subpoenas themselves. They make no arguments concerning relevance, privilege, burden or the like. Their sole contention on appeal is that the District Court erred in failing to dismiss the complaint for lack of subject matter jurisdiction. Indeed, their admitted "sole" motivation for refusing to produce the subpoenaed documents was to obtain appellate review of the District Court's decisions denying dismissal of the action. (J.A. 103)

What petitioners seek, in other words, is to evade both the rule against interlocutory appeals and the constraints on issuance of extraordinary writs and to obtain what no appellate court has ever permitted, either to a party or a non-party: a direct appeal, in the guise of an appeal from a contempt order, of a

district court's denial of a motion to dismiss.

The United States Court of Appeals for the Second Circuit rightly refused to permit such an evasion. This Court should do the same.

The Underlying Action

For well over half a century it has been settled public policy that the tax code shall not be used to subsidize the political activities of charitable organizations. As Judge Learned Hand, reviewing an administrative decision denying a tax deduction for gifts to a charity engaged in legislative lobbying activities, wrote in 1930:

Political agitation as such is outside the statute, however innocent the aim. . . . Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them.

Slee v. Commissioner, 42 F.2d 184, 185
(2d Cir. 1930).

In 1934, Congress partially codified the policy expressed by Judge Hand and specifically provided that contributions to charities a "substantial part of [whose] activities is carrying on propaganda, or otherwise attempting, to influence legislation" shall not be deductible to the donor. Revenue Act of 1934, § 517, 48 Stat. 760.²

Twenty years later, Congress added the provision that is the subject of this lawsuit. When revising the Internal Revenue Code in 1954, Congress amended 26 U.S.C. § 501(c)(3) to prohibit the granting of tax-exempt status to religious and other charitable organizations that

²/An attempt to extend the prohibition to "participation in partisan politics" was not adopted at that time. Lobbying and Political Activities of Tax-exempt Organizations: Hearings before the Subcomm. on Oversight of the House Comm. on Ways and Means, 100th Cong., 1st Sess. 344-48 (1987) (hereinafter "House Hearings") (Congressional Research Service Report).

participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.³

By thus prohibiting tax-exempt organizations from engaging in any partisan political activity, Congress adopted in full the rule laid down by Judge Hand twenty-four years earlier that the Treasury would not fund "political agitation" in the name of charitable causes.

But the will of Congress and the mandate of the Constitution have been

³/The amendment was proposed on the Senate floor by then Senator Lyndon Baines Johnson and was adopted with little debate or discussion. 100 Cong. Rec. 9604. House Hearings 348 (Congressional Research Service Report).

The Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10711 (Dec. 22, 1987), makes it explicit that the ban on campaign activities also extends to activities "in opposition to" candidates, a position long held by the Internal Revenue Service. Treas. Reg. § 1.501(c)(3)-1(b)(3)(ii).

frustrated. By refusing to enforce this provision of the tax code against one particular religious organization politically active in the abortion-rights debate, the government has effectively granted to that preferred participant a subsidy, to its advantage and to the disadvantage of others for whom abortion rights issues are no less important but who take a different position. It is to end this unconstitutional favoritism of one religion over others and to end the unconstitutional distortion by the government of the process of public debate that respondents have brought this action.

The amended complaint alleges,⁴ in brief, that the Roman Catholic

4/As the issue of standing was raised below on motions to dismiss, the Court is required to accept as true all the material allegations of the amended complaint (J.A. 5-19) and the affidavits submitted by respondents in opposition to the motions (J.A. 28-66), and to construe these facts [Footnote 4 continued on next page]

Church in the United States ("the Church" or "the Catholic Church"), in violation of the clear language and intent of the anti-electioneering provision of 26 U.S.C. § 501(c)(3), has engaged in a persistent and regular pattern of intervening in elections nationwide in favor of candidates who support the Church's position on abortion and in opposition to candidates with opposing views. (J.A. 10-13)⁵

The government respondents, the Secretary of the Treasury and the

[Footnote 4 continued from previous page] in the light most favorable to the respondents. *Pennell v. City of San Jose*, No. 86-753, slip. op. at 4-5 (Feb. 24, 1988); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109 n.22, 112 (1979); *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

⁵/The amended complaint is limited solely to "electioneering" -- partisan political activity. It does not challenge the IRS' enforcement of tax code provisions governing lobbying and does not include any allegations concerning the Catholic Church's lobbying activities.

Commissioner of Internal Revenue, (defendants below, referred to herein as "the government" or the "IRS"), despite their knowledge of these activities, have done nothing to enforce the law against such violations. (J.A. 13-14)

By thus exempting the Catholic Church from the tax code, the IRS, in violation of the clear command of Congress, has granted the Church the equivalent of a cash subsidy for its partisan political activity⁶ -- a

6/ Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions.

Regan v. Taxation With Representation, 461 U.S. 540, 544 (1983) (footnote omitted).

subsidy denied to respondents (the plaintiffs below) in violation, inter alia, of their rights under the Establishment Clause of the First Amendment. Respondents seek, among other relief, an order requiring the IRS to take appropriate enforcement action against the Catholic Church. (J.A. 18-19)

Filed in January 1981, the amended complaint details the Church's "active[] and systematic[] participat[ion] in political campaigns in all parts of the country, supporting 'pro-life' and opposing 'pro-choice' candidates for public office." (J.A. 11) The "blueprint" for the campaign is the "Pastoral Plan for Pro-Life Activities" adopted by petitioners⁷ in November 1975. (J.A. 10-11; C.A. App. A 480-93) The Plan calls for the mobilization of "all church-sponsored or identifiable Catholic" organizations, agencies, priests and lay persons in a "major"

7/ Petitioners are the United States Catholic Conference ("USCC") and the National Conference of Catholic Bishops ("NCCB"), each comprised of the 350 active Roman Catholic bishops in the United States. USCC, a Washington, D.C. corporation, is the Church's "secular" arm and NCCB, an unincorporated association, is its "ecclesiastical" or pastoral arm. The membership, officers and principal staff of the two organizations are the same. (J.A. 9) The USCC holds a single group tax-exemption letter from the IRS which covers every Catholic entity in the United States. (J.A. 24-27, 104-05)

educational, pastoral and political effort to outlaw abortion in the United States. (J.A. 11) On the political front, the Plan calls for the creation -- in every congressional district in the country -- of "congressional district pro-life action group[s]" whose objectives are, inter alia:

8. To elect members of their own group or active sympathizers to specific posts in all local party organizations. . . .
10. To maintain an informational file on the pro-life position of every elected official and potential candidate.
11. To work for qualified candidates who will vote for a constitutional amendment, and other pro-life issues. . . .

(Id.)

Pursuant to the Pastoral Plan and Church policy, Catholic Church officials have played prominent, tax-subsidized roles in many major political campaigns. In 1976, for example, the Archdiocese of New York donated "substantial sums"

towards the senatorial candidacy of James Buckley. (J.A. 13) In 1978, Church officials used church publications to campaign throughout the Pittsburgh, Pennsylvania diocese against the re-election of Congressman William Moorehead. (J.A. 12)

In the months before this case was filed in 1980, Church officials were politically active in many parts of the country. In April, a South Dakota priest attacked Senator George McGovern and publicly sought the support of other priests for his opponent's campaign. In May, the official newspaper of the San Antonio, Texas Archdiocese published an editorial supporting Ronald Reagan in the Texas presidential primary. The editorial was entitled "To the IRS--'NUTS!!!" (J.A. 12; C.A. App. A 535)

A few months later, in September 1980, the Archdiocese of Boston and the

Diocese of Worcester campaigned publicly against the nomination of two "pro-choice" congressional candidates in the Boston area. (J.A. 12) Humberto Cardinal Medeiros of Boston issued a letter attacking the two candidates which was read from 410 pulpits a few days before the primary election and published in the official archdiocesan newspaper. (Id.) Monsignor Battista of the Worcester Diocese also published and distributed widely a letter attacking by name one of the candidates. (Id.)⁸

Tax-subsidized Catholic electioneering has continued since the filing of this lawsuit, most notably in the 1984 presidential campaign. John Cardinal Krol, Buffalo Bishop Edward Head and Newark Bishop Peter Gerety appeared at political rallies in their respective

8/Monsignor Battista's letter was signed by seventy clergy members of the Worcester Diocese. Boston Globe, Sept. 11, 1980, at 1, 25.

communities held in support of Ronald Reagan's re-election. (See Hentoff, Profile: "I'm Finally Going To Be a Pastor," Part 2, The New Yorker, Mar. 30, 1987, at 43; N.Y. Times, Sept. 10, 1984, at B9, col. 1.) Boston Archbishop Bernard Law and seventeen other New England bishops issued a statement that abortion was "the critical issue" of the presidential campaign and urged voters to judge candidates by their positions on abortion. (Boston Globe, Sept. 5, 1984, at 1; N.Y. Times, Sept. 23, 1984, sec. 1 at 34) In New York, then Archbishop O'Connor went on television to urge Catholics not to vote for candidates who favored abortions and to criticize Vice Presidential candidate Geraldine Ferraro's position on abortion as being anti-Catholic.⁹

⁹/See, e.g., N.Y. Times, Sept. 10, 1984, at A1, col. 8; "Politics and the Pulpit," Newsweek, Sept. 17, 1984, at 24, col. 1; "For God and Country," [Footnote 9 continued on next page]

The adoption of the 1975 Pastoral Plan and the subsequent record of official Catholic Church electioneering received wide-spread publicity in the national press. (J.A. 13) The IRS was also specifically informed of some of these activities by various citizens and taxpayers who requested the Service take enforcement action. (Id.) In addition, the pervasive role of the Catholic Church in Minnesota partisan politics at all levels was the subject of testimony before, and extensive findings of fact by, the District Court in McRae v. Califano, 491 F.Supp. 630, 716-22 (E.D.N.Y.), rev'd on other grounds sub

[Footnote 9 continued from previous page]
Time, Sept. 10, 1984, at 8, col. 1.

Church officials also were active in local elections in 1984. Bishop Thomas Welsh of the Diocese of Allentown (Pa.), for example, gave Representative Don Ritter "a clear and unqualified endorsement" in his re-election campaign. The Globe-Times (Bethlehem, Pa.), Jan. 24, 1984, at A-6.

nom. Harris v. McRae, 448 U.S. 297
(1980).

Despite all the national publicity, the judicial findings and the information provided directly to the IRS, the IRS has never taken any steps to enforce the law, to revoke or suspend the Church's tax-exemption or to implement any other preventative or enforcement measures against the Church for its numerous, notorious and clear-cut violations of § 501(c)(3).
(J.A. 13-14)¹⁰

10/Indeed, the violations of law have been so flagrant that even some Church officials expected IRS enforcement action. For example (according to documents produced pursuant to a deposition subpoena duces tecum issued by respondents below), following the publication of the editorial endorsing Ronald Reagan in the official San Antonio, Texas Archdiocese newspaper under the headline, "To the IRS--'NUTS!!!'", the Archbishop of San Antonio wrote to petitioner USCC asking for assistance:

The editor of our official newspaper, TODAY'S CATHOLIC, in an editorial, proceeded to challenge the Internal Revenue Service. The editorial was picked up by a good number of periodicals, Catholic as
[Footnote 10 continued on next page]

Not all religious groups have been treated by the IRS as favorably as the Catholic Church. In one well-publicized case that occurred before the filing of this action, the IRS suspended the tax-exempt status of a Protestant journal for publishing editorials endorsing a candidate, in much the same manner as the San Antonio Archdiocese paper. The Christian Century, a weekly magazine published by a non-profit foundation, published three editorials in July and September 1964

[Footnote 10 continued from previous page]
well as dailies, throughout the country. I think it was rather offensive to IRS and I don't think they are going to keep quiet.

(Letter from Most Rev. P. F. Flores, Archbishop of San Antonio, to Legal Department, USCC, July 10, 1980)

Archbishop Flores need not have been concerned, however. There was no communication of any sort, formal or informal, from the IRS to the Archdiocese or the Archbishop concerning the editorial. (Letter from Thomas Drought, Esq., counsel to the Archdiocese, to Mark J. Cannan, Esq., respondents' counsel, Aug. 1, 1984; see also N.Y. Times, Aug. 16, 1981, at 49, col. 2)

supporting a candidate in that year's presidential election. The IRS "withdrew" the tax-exempt status of the foundation for three years for "violat[ing] Section 501(c)(3) because of political activities." (Letter from IRS District Director to Christian Century Foundation, Oct. 19, 1967; see "2 Church Journals Face Tax Inquiry," N.Y. Times, May 16, 1966.)

Proceedings Below

The response to the amended complaint by both the government and petitioners -- they have acted as one for most purposes -- has been a tenacious and single-minded effort to avoid consideration of the merits, even to the extent of a studied and premeditated act in contempt of court. The instant proceedings are the culmination of a relentless series of motions, petitions and appeals taken in lockstep by petitioners and the government, all seeking the same relief:

the dismissal of the complaint on jurisdictional grounds.

After the amended complaint was filed, the government and the petitioners, who were then defendants, moved to dismiss on the ground, among others, that respondents lacked standing to sue. (J.A. 20-23) In its July 1982 opinion deciding the motion (Pet. App. 54a-92a, reported at 544 F.Supp 471 (S.D.N.Y. 1982)), the District Court for the Southern District of New York upheld the standing of twenty-four plaintiffs as clergy members, voters and organizations whose members are voters, to assert certain claims against the government. (Pet. App. 55a-79a, 91a)¹¹

¹¹/The District Court dismissed the amended complaint in its entirety against the USCC and the NCCB for failure to state a claim against those two bodies (Pet. App. 83a-84a), and also dismissed the claim for a declaratory judgment against the government. (Pet. App. 89a-91a) In addition, the District Court dismissed five plaintiffs, all health care
[Footnote 11 continued on next page]

The government moved for certification of an interlocutory appeal of the District Court's decision under 28 U.S.C. § 1292(b). Although no longer parties, petitioners joined in the motion. (Pet. App. 46a) The request was denied. (J.A. 2, reported at 552 F.Supp. 364 (S.D.N.Y. 1982))

Early in 1983, the government and respondents served separate deposition subpoenas duces tecum on petitioners.¹²

[Footnote 11 continued from previous page]
facilities offering abortions, for lack of standing. (Pet. App. 67a, 91a) Three more plaintiffs were subsequently dismissed by stipulation of the parties in March 1986. (J.A. 4)

12/Respondents asked for documents relating to the adoption and implementation of portions of petitioners' 1975 Pastoral Plan for Pro-Life Activities, particularly the section dealing with congressional district committees, the names and addresses of Catholic officials responsible for pro-life activities, financial support for and other contact with political candidates and certain identified "right to life" committees, and communications with the IRS and others concerning the Catholic Church's tax-exempt status
[Footnote 12 continued on next page]

Petitioners began a series of maneuvers to forestall discovery and obtain appellate review of the District Court's interlocutory order denying the motion to dismiss. First, petitioners moved to quash the subpoenas in the Southern District of New York realleging lack of subject matter jurisdiction (standing). The motion was denied and production ordered on April 3, 1984. (J.A. 80) No discovery was had, however, as petitioners refused to produce any documents until after this Court's decision in Allen v. Wright, which was then pending. (Pet. App. 46a)

After Allen was decided, 468 U.S. 737 (1984), the government renewed its

[Footnote 12 continued from previous page]
and its compliance with the anti-electioneering provisions of § 501(c)(3). (J.A. 67-79)

The governments' subpoenas are reproduced at C.A. App. A 150-59 and C.A. App. A 529-33. The government has apparently done nothing to secure compliance with its subpoenas.

motion to dismiss for lack of standing. Petitioners once again submitted an amicus brief in support of government's position. (J.A. 2) The District Court denied the motion in February 1985. (Pet. App. 93a-102a, reported at 603 F.Supp. 970 (S.D.N.Y. 1985)). The government again requested certification under 28 U.S.C. § 1292(b), which was denied. (J.A. 3; C.A. App. A 243-46)

In the summer of 1985 -- more than two years after the service of the subpoenas -- petitioners still had not produced any documents and respondents moved to hold them in contempt. (J.A. 3) Petitioners cross-moved for a protective order, expressing concern about the scope of the subpoenas under the First Amendment and asking for a further delay of production pending the filing of the government's anticipated petition for mandamus. (J.A. 3; C.A. App. A 238-50)

The District Court, in its September 5, 1985 order (J.A. 81-82), reviewed the subpoenas, found that two portions of respondents' subpoenas "could conceivably trench on First Amendment considerations" (J. A. 81), and ruled that no documents need be produced under those two sections at that time.¹³ The District Court denied the other objections raised by petitioners and "ordered [them] to comply with the subpoena forthwith." (J.A. 82)

Before there was any production, however, the government filed a petition in the Court of Appeals for a writ of prohibition or mandamus to overturn the District Court's decisions on standing. Petitioners, who submitted an amicus brief in support of the petition, persuaded the District Court to postpone pro-

¹³/These two sections of the subpoenas, requests no.2 and 8a (J.A. 70-71) calling for minutes of internal church meetings, have been withdrawn by respondents in light of the District Court's order.

duction of documents until the petition was decided. (J.A. 83-84)¹⁴

The government's mandamus petition was denied by the Court of Appeals, without opinion, on January 14, 1986. In re Baker, 788 F.2d 3 (2d Cir. 1986) (table).¹⁵

On February 26, 1986, the District Court ordered document production to take place on March 7. (J.A. 87) Petitioners, however, despite the Second Circuit's refusal to disturb the District Court's decisions on standing, despite the surgery performed on the subpoenas by the District Court to meet petitioners'

14/At the same time, while the mandamus petition was pending, the District Court resolved petitioners' remaining objections to the subpoenas including the confidentiality of certain records. (J.A. 83-84) A protective order, agreed to by petitioners, respondents and the government, was entered by stipulation on February 4, 1986. (J.A. 85-86; C.A. App. A 268-76)

15/The government's petition for rehearing and suggestion for rehearing en banc were denied on March 3, 1986. (C.A. App. A 281)

objections, and despite the negotiation and entry of a confidentiality order acceptable to them, still refused to produce their documents. (J.A. 94, 102)

But by this time the District Court's patience with petitioners had reached its limit. In its May 8 and 9, 1986 orders (Pet. App. 44a-53a)¹⁶ -- the orders which are under review here -- the District Court held petitioners in contempt for willfully refusing to produce documents. The Court found that petitioners "did more than fail to be forthright with the court. They began to engage the court and the plaintiffs in a series of maneuvers that -- given [petitioners'] apparent intention of ultimate non-compliance -- made a game of the judicial process." (Pet. App. 47a)

Concluding that petitioners had "willfully misled the Court and the

¹⁶/The May 8, 1986 order is reported at 110 F.R.D. 337 (S.D.N.Y. 1986).

plaintiffs and ha[d] made a travesty of the court process" (Pet. App. 44a-45a), the District Court imposed sanctions of \$50,000 a day on each entity until the documents were produced, and also awarded respondents attorneys fees for certain aspects of the contempt proceedings. (Pet. App. 51a-53a)¹⁷

Petitioners appealed to the Court of Appeals for the Second Circuit. This time the government submitted briefs and argued in support of the petitioner's position in the Court of Appeals.¹⁸

¹⁷/The fine has been stayed pending the determination of this appeal. (Pet. App. 52a-53a; 105a-110a)

¹⁸/While the appeal below was pending in the Court of Appeals, the government sought to have this Court review the Second Circuit's denial of its mandamus petition. The government filed petitions for a writ of certiorari (No. 86-157) and for a writ of mandamus or prohibition (No. 86-162) in this Court for the same relief the government had sought and petitioners were then seeking in the Court of Appeals -- the reversal of the District Court's interlocutory decisions upholding respondents' [Footnote 18 continued on next page]

The Court of Appeals affirmed the District Court's contempt citation. (Pet. App. 1a-43a, reported at 824 F.2d 156 (2d Cir. 1987)) Relying on the rule against interlocutory appeals and this Court's decision in Blair v. United States, 250 U.S. 273 (1919), Judge Newman, writing for the majority, held that as non-party witnesses the USCC and the NCCB

may make only the limited challenge as to whether there exists a colorable basis for exercising subject matter jurisdiction, and not a full-scale challenge to the correctness of the district court's exercise of such jurisdiction.

(Pet. App. 10a) After reviewing the allegations supporting respondents' standing, the majority concluded that "the District Court cannot be said to be usurping power in determining that sub-

[Footnote 18 continued from previous page]
standing to sue. The Court denied both petitions on October 6, 1986.

ject matter jurisdiction exists." (Pet. App. 19a)¹⁹

As was the case in the Court of Appeals, petitioners do not deny that they are in contempt and do not raise any objections to the subpoenas or District Court orders addressed to the subpoenas.

The sole ground advanced by petitioners -- and the government -- in their respective appeals and petitions to the Court of Appeals and this Court is that since respondents do not have standing to bring the lawsuit, the District Court does not have subject matter jurisdiction to entertain the action. The Court of Appeals affirmed the District Court and

¹⁹/Judge Kearse concurred in the majority opinion and added an additional ground to support it: discovery is appropriate to assist in gathering proof on the question of plaintiffs' standing. (Pet. App. 42a-43a) Judge Cardamone dissented from the judgment of the Court of Appeals addressing only the scope of appellate review. His opinion is silent on respondents' standing. (Pet. App. 21a-41a)

denied petitioners' appeal. Both this Court and the Court of Appeals denied the government's mandamus petitions. This Court should similarly reject this appeal.

Summary of Argument

I. The threshold issue in this case is not, as petitioners would have it, whether a court without jurisdiction can act. Rather, the question before the Court is whether and when a district court's determination that it has subject matter jurisdiction can properly be challenged on appeal.

There is no rule more fundamental to federal appellate practice than the one limiting appeals from the district court to final orders and decrees. This policy originated in the Judiciary Act of 1789 and is the "'dominant rule in federal appellate practice.'" DiBella v. United

States, 369 U.S. 121, 126 (1962). The rule against interlocutory appeals protects against against piecemeal litigation, "involves the important purpose of promoting efficient judicial administration" and reflects "the deference that appellate courts owe to the trial judge" Firestone Tire Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981).

Courts have created only limited exceptions to this fundamental rule for the small class of issues that are both separable from the underlying action and also concern important rights and fundamental interests that would otherwise be denied review. One such exception permits non-party witnesses to appeal a civil contempt citation. But the reason for allowing such an appeal limits its scope: the appeal affords the witness immediate review only of those issues that are important to him (such as privilege, personal jurisdiction, and the

like), but remain separate from those raised in the main action. See Blair v. United States, 250 U.S. 273, 281-83 (1919).

Petitioners do not challenge the content or scope of respondents' demands for discovery or claim injury to any other personal rights. Instead, petitioners seek review exclusively of prior denials by the District Court of motions to dismiss in which the Court concluded that it had subject matter jurisdiction over the underlying action.

No court has permitted what petitioners attempt to do here. Were petitioners to prevail, any nonparty witness, with or without the collusion of a party to the action, would be able to bring any case to an abrupt halt simply by refusing to give evidence, being held in contempt (with sanctions stayed) and then challenging on appeal the subject matter jurisdiction of the underlying action.

Because no prior determination would be binding upon such a witness, and because witnesses in different states would be able to raise the jurisdiction question in different districts and circuits, petitioners' position raises the spectre of constant re-litigation and multiple inconsistent rulings on the same issue in the same case.

Petitioners' only alleged injury is that they must comply with a discovery order. The burden for a non-party witness of giving testimony is, however, a duty of citizenship necessary for orderly judicial administration. The hardship imposed on a defendant of having to appear and defend an action through trial is much greater, but is still insufficient to create a right to interlocutory review of an adverse ruling sustaining subject matter jurisdiction. A fortiori, the much lighter burden imposed upon a

witness should not create a right greater than that given to the party.

II. Petitioners may not bring an interlocutory challenge to the standing of the respondents to maintain this action. Even if this Court does decide to review the issue of standing, it should affirm the District Court's contempt order. As the District Court properly found, respondents satisfy both the constitutional and the prudential requirements for standing.

Organizations exempt from taxation under 26 U.S.C. § 501(c)(3) are prohibited from engaging in partisan political activities. Respondents allege that the IRS has exempted the Catholic Church from this statute permitting the Church freely to support or oppose candidates for public office, depending on their views concerning abortion. The exemption is the equivalent of a subsidy or cash grant for one church's political activities and

violates both the Internal Revenue Code and the Establishment Clause. This government-created harm injures respondents in various ways.

Clergy respondents include members of the clergy active in the public debate on abortion but whose religious beliefs on this issue differ from those of the Catholic Church. The IRS injures the clergy in the furtherance of their ministries by subsidizing and tacitly endorsing the political activities of their Catholic counterparts active in the same communities and the same public debate.

Respondents also include individuals who are actively involved in the political process as voters, campaign contributors, and political candidates. These respondents are directly injured, economically as well as in other ways, by the distortion in the political process caused by the government's subsidy of

only one participant in the political debate, the Church. For these respondents, as well as for clergy respondents, the injury flows directly from the government's unconstitutional religious favoritism that tilts the political and spiritual playing field. Respondents' injuries can be remedied by a court order restoring the neutrality required by the Constitution.

Prudential considerations do not weigh against a finding of standing. Unlike Allen v. Wright, 468 U.S. 737 (1984) and other cases, this case involves, not abstract concerns shared by all, but direct personal injuries flowing from nonenforcement of a specific provision of the tax code against a single religion.

Resolution of respondents' claims does not require large-scale judicial intervention in the discretionary manner in which the executive branch conducts

its business. The command of the statute is clear and the violation complained of is specific and well documented. The IRS does not have discretion to violate the Constitution. This Court, moreover, has long recognized that the judiciary has an affirmative duty to protect individuals whose fundamental constitutional rights have been violated.

Argument

I.

**The District Court's Refusal to
Dismiss For Lack of Jurisdiction
Is Not Appealable.**

The threshold question presented here is whether a non-party witness, by disobeying an order to comply with a subpoena and appealing the ensuing contempt order, can obtain appellate review of a district court's refusal to dismiss

the underlying action for lack of subject matter jurisdiction.

Petitioners argue that appellate review must be available, notwithstanding that a decision upholding jurisdiction is interlocutory, because a court without jurisdiction has no power to enforce a subpoena. But this argument is a non sequitur. That a court without jurisdiction lacks judicial power may be a truism, but it says nothing at all about if, when or by whom a trial court's decisions are appealable. An interlocutory decision does not become appealable -- by a party or a non-party witness -- simply because the issue raised is one of subject matter jurisdiction.

Neither, of course, can petitioners challenge the District Court's jurisdiction of the underlying action as a kind of volunteer monitor of the judiciary's adherence to correct jurisdictional principles. They must assert an interest of

their own that can be vindicated on the appeal. But petitioners are strangers to this lawsuit; they are not parties and have no legal interest in the case except by virtue of the compulsion they are under to comply with the District Court's discovery order. Thus there is simply nothing here to be appealed unless that order violates some right or immunity of petitioners.

Petitioners identify no such violation. They raise on appeal no objection whatsoever to the order itself. They do not challenge the court's personal jurisdiction over them or the propriety of the discovery under the Federal Rules of Civil Procedure. They do not claim a violation of the First Amendment, of any testimonial privilege, of due process, or of any other right or immunity, constitutional or otherwise.

Indeed, the only "right" that petitioners have asserted and can possibly

vindicate on this appeal is that of immediate appellate review of the District Court's ruling on standing. As a matter of form, petitioners' appeal is from the contempt order, but in substance it is indistinguishable from a direct appeal of the District Court's denial of the government's motions to dismiss.

Petitioners have not cited, and respondents have not found, a single case permitting an appeal in these circumstances. On the contrary, the relevant precedent squarely rejects petitioners' argument. A district court's denial of a motion to dismiss is not appealable, by parties or non-parties, and the result is not changed merely because the would-be appellants are non-parties who happen to be in contempt of a court order enforcing a subpoena.

**A. The District Court's Jurisdiction
in the Underlying Action Is Not
an Issue in Which Petitioners
Have an Interest.**

It has long been clear that a recalcitrant witness cannot excuse a refusal to give evidence by challenging the jurisdiction of the court. This Court so held nearly seventy years ago in rejecting the challenge of a witness to the jurisdiction of a court and a grand jury over the subject matter of the inquiry:

[T]he giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned The duty, so onerous at times, yet so necessary to the administration of justice according to the forms and modes established in our system of government . . . , is subject to mitigation in exceptional circumstances; there is a constitutional exemption from being compelled in any criminal case to be a witness against oneself . . . ; some confidential matters are shielded, from considerations of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.

But, aside from exceptions and qualifications, -- and none such is asserted in the present case, -- the witness is bound not only to attend, but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry.

He is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of his

On familiar principles, he is not entitled to challenge the authority of the court or of the grand jury, provided they have a de facto existence and organization.

. . . In truth it is, in the ordinary case, no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not.

Blair v. United States, 250 U.S. 273,

281-83 (1919) (citations omitted)

(emphasis added). As the Court of

Appeals rightly held, the decision in

Blair is controlling here and requires

the rejection of petitioners' appeal.

Petitioners seek to distinguish Blair on the ground that the court order in that case was issued pursuant to a grand jury investigation, which is not

subject to Article III limitations. But, as the Court of Appeals recognized, Blair does not rest solely -- or even primarily -- on the inherent investigatory powers of a grand jury. Its broad language states "a rule of wider application" (Pet. App. 10a) arising from the fundamental principle that a person may litigate only those issues that are of "concern" or interest to him.

In this context, that principle means that a witness seeking to excuse his noncompliance with a subpoena is confined to such matters as privilege, burden or other "special reasons" affecting him individually. Other issues are simply of "no concern" to him. 250 U.S. at 283.²⁰

²⁰/Maness v. Meyers, 419 U.S. 449 (1975), cited by petitioners (Brief for Petitioners ["Pet. Br."], 23), is not to the contrary. In that case the appellant asserted a Fifth Amendment privilege that might be irreparably compromised by compliance. 419 U.S. at 462 and n.10. Petitioners, [Footnote 20 continued on next page]

Having to give testimony or produce documents may, of course, be "onerous at times." 250 U.S. at 281. A party compelled to defend a lawsuit commonly bears much greater burdens, however, and these burdens have been squarely rejected as a reason to permit appeals from a non-final order. Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 383 (1953).

The rules governing discovery, moreover, provide safeguards against abuse. For example, witnesses can be subpoenaed only where they live. Fed. R. Civ. P. 45. The courts are given broad power to protect against "annoyance, embarrass-

[Footnote 20 continued from previous page]
however, identify no protected interest of their own that is threatened by the court's order. Of course, one cannot "unring the bell," id. at 460, once privileged information is released, but petitioners have not attacked the subpoenas on grounds of privilege or any other ground related to the discovery sought, and thus have not identified any "bell" that would be rung by compliance.

ment, oppression, or undue burden or expense," Fed. R. Civ. P. 26(c), and judges are sensitive to the hardships imposed on witnesses.²¹

There will generally remain, of course, a residue of inconvenience. That is simply an unavoidable consequence of the "public obligation to provide evidence," Hurtado v. United States, 410 U.S. 578, 589 (1973), an obligation imposed upon all citizens as essential to the functioning of the judicial system in a law-abiding society. Just as the

²¹/Petitioners themselves are the beneficiaries of several protective orders issued by the District Court, including one protecting confidential documents. Indeed, it was precisely the inconsistent action of the petitioners in seeking relief from -- and taking the time and energy of -- the very court whose power to act they now deny that prompted the severity of the contempt sanction against them. Had petitioners been forthright with Judge Carter about their intentions, the sanctions would have been minimal and this appeal could have been brought and considered at the same time as the government's petition for mandamus in 1985. (Pet. App. 47a-49a)

greater burden of defending a lawsuit does not warrant an exception to the rule against interlocutory appeals, so too the less consequential burden of a subpoena does not entitle a witness to interrupt an ongoing litigation to challenge on appeal the court's jurisdiction to entertain the action.²²

As the Court of Appeals rightly reasoned, United States v. United Mine Workers, 330 U.S. 258 (1947), does not require a contrary result. Indeed, no case stands more clearly for the principle, in the words of the Court of

²²/That petitioners may be concerned about the outcome of the case does not alter the situation. If those concerns amount to a legal interest in this action, petitioners may ensure appellate review of the standing issue by intervening, before or after judgment, and appealing any judgment in favor of respondents. Certainly a concern not amounting to a basis for intervention as a party should not be the basis for the grant of greater power to raise jurisdictional issues on appeal than that possessed by a party.

Appeals, that "the orderly processes of the courts must be observed even if it is subsequently determined by an appellate court that the trial court lacked subject matter jurisdiction." (Pet. App. 13a)

In Mine Workers the jurisdictional challenge was to the power of the district court to issue the particular kind of order -- specifically, an injunction against striking -- for violation of which the appellants were found in contempt. On appeal the lower court's jurisdiction to issue that kind of order was naturally an issue that could properly be raised.

In this case, however, the Federal Rules of Civil Procedure explicitly authorize the issuance of deposition subpoenas (Rule 45) and orders to enforce them (Rules 26, 37 and 45). Thus, the question of subject matter jurisdiction does not relate to the orders themselves, as it did to the injunctions in Mine

Workers, but solely to the underlying action.

There is nothing in the Mine Workers opinion to suggest that the appellants there could have used the appeal from their contempt orders as an occasion to challenge the jurisdiction of the district court over the underlying action for a declaratory judgment. Certainly Mine Workers is not authority for the notion that a witness, who is burdened by no injunction against otherwise lawful activity, but has merely been called upon to discharge his "public obligation to provide evidence," Hurtado v. United States, 410 U.S. at 589, can bring any case in the federal court system to an abrupt halt merely by disobeying a subpoena.²³

²³/The distinction in Mine Workers between civil and criminal contempt is also unavailing to petitioners. There the Court noted that, unlike fines for criminal contempt, those for civil court's jurisdiction may be presented [Footnote 23 continued on next page]

B. The Rule Against Interlocutory Appeals Makes No Exception for Jurisdictional Challenges.

The reason that no case has allowed review of subject matter jurisdiction in circumstances like those of this action is that such a holding would be fundamen-

[Footnote 23 continued from previous page]
for review. In contrast to Mine Workers, there is no likelihood in this case that respondents would profit from any fine paid if subject matter jurisdiction is ultimately found lacking. At the May 9, 1986 hearing on petitioners' request for a stay of the contempt sanction, Judge Carter orally directed that the fine be paid to the United States Treasury and not to respondents. As the Court of Appeals noted, the ultimate disposition of a fine, if any is paid, is not at issue. (Pet. App. 14a-15a)

Of the other cases cited by petitioners, only one, *Ex parte Fisk*, 113 U.S. 713 (1885), concerns an interlocutory order remotely comparable to that at issue here. But in Fisk as in Mine Workers the challenge was not to the court's jurisdiction over the underlying case but to its power to issue the particular kind of order for the violation of which the appellant had been held in contempt. In Fisk it was an order to attend an examination before trial, which in the days before modern discovery practice the district court was not authorized to issue.

tally inconsistent with the rule against interlocutory appeals.

There is no rule more fundamental to federal appellate practice than the one limiting appeals from the district court to "final decisions." 28 U.S.C. § 1291. The rule reflects much more than "merely technical conceptions of 'finality.'" It is [a policy] against piecemeal litigation." Catlin v. United States, 324 U.S. 229, 233-34 (1945). As this Court has held:

Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.

Cobbledick v. United States, 309 U.S.

323, 325 (1940).²⁴

There is no constitutional right to an appeal. United States v. MacCollom, 426 U.S. 317, 323 (1976). Being a matter of legislative "grace," the availability of appellate review is strictly subject to the requirement of finality imposed by the enabling legislation. There is no exception for appeals asserting a lack of

²⁴/As this Court has more recently stated, the rule against interlocutory appeals "serves a number of important purposes" in addition to those expressed in Cobbledick, to wit:

It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. . . . The rule also serves the important purpose of promoting judicial administration.

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981).

subject matter jurisdiction. "[D]enial of a motion to dismiss, even when the motion is based on jurisdictional grounds, is not immediately reviewable." Catlin v. United States, 324 U.S. at 236.

That an order issued without jurisdiction will be vacated on a proper appeal does not render appealable every order that some would-be appellant claims was issued without jurisdiction. Petitioners' notion that an appellate court "is bound" to consider the district court's jurisdiction whenever "anyone" suggests that it do so (Pet. Br. 22) is simply wrong. Indeed, if petitioners were correct, no petition for mandamus asserting a challenge to the district court's jurisdiction could ever be denied without a full consideration of the jurisdictional issue, a proposition disproved by the denials in both the Court

of Appeals and this Court of petitions for mandamus in this case.²⁵

Notwithstanding the heavy reliance they place on it, Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986), offers petitioners no comfort in this regard. On the contrary, what Bender holds is that "[o]n every writ of error or appeal, the first and fundamental question is that of jurisdiction, first,

25/A petition for a writ of mandamus or prohibition raising jurisdictional issues is treated like any other petition for an extraordinary writ. No special rules apply:

[A]ppellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions which it was competent to decide and which are reviewable in the regular course of appeal.

Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943). Nothing less than "a usurpation of power" will warrant mandamus. Pfizer, Inc. v. Lord, 522 F.2d 612, 615 (8th Cir. 1975), cert. denied sub nom. Government of India v. Pfizer, Inc. 424 U.S. 950 (1976); American Airlines, Inc. v. Forman, 204 F.2d 230, 232 (3rd Cir.), cert. denied, 349 U.S. 806 (1953).

of this court, and then of the court from which the record comes" 475 U.S. at 547 (emphasis added). Bender does not establish the automatic appealability of any challenge to the jurisdiction of a district court; it teaches, rather, that the threshold issue on any appeal is appellate jurisdiction.

In Bender the Court held that someone not a party to the action has no standing to appeal from a final judgment. Surely petitioners do not mean to suggest that the result would have been different -- i.e., that the appeal would have been entertained -- if the would-be appellant had challenged the decision of the district court on jurisdictional grounds rather than on the merits. Yet that is what necessarily follows from their assertion -- citing Bender -- that the jurisdiction of the district court "must be examined on this appeal." (Pet. Br. 22 n.11) (emphasis added)

Of course, it is true that a civil contempt order is generally appealable by a non-party contemnor prior to final judgment in the main action, United States v. Ryan, 402 U.S. 530 (1971), but the reasons for this exception to the final judgment rule also delimit its scope. Contempt orders are examples of "that small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action" Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949).

They are appealable, in other words, because of their separable, collateral nature, which allows the appeal to proceed without unduly interfering with the progress of the underlying lawsuit. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374-75 (1981). Cf. International Business Machines Corp. v. United States, 493 F.2d 112, 115 n.1 (2d

Cir. 1973), cert. denied, 416 U.S. 995 (1974). These considerations plainly do not justify extending the exception to include an appeal, by either a party or a non-party, which simply seeks to gain appellate review of an otherwise nonappealable interlocutory order that is inseparable from the issues raised in the underlying action.

C. The Standard of Review Adopted By the Court of Appeals Is Correct.

To permit collateral attacks on jurisdiction by non-party witnesses would have devastating consequences on the ability of the district courts to enforce their orders and to manage the flow of litigation. At any time, a non-party witness could bring a lawsuit to a halt, simply by challenging the court's jurisdiction to entertain the action. Because the witness would not be bound by any prior ruling on the subject, that the

district court had already examined its jurisdiction would count for naught.

If a subpoena were issued by a district court other than the one in which the action was pending, the witness could insist that his challenge be ruled on by the issuing court. Fed. R. Civ. P.

45(d). Non-party witnesses could thus force the parties to re-litigate jurisdictional questions in as many courts as issued subpoenas, raising the possibility of multiple inconsistent jurisdictional rulings by district courts or even by courts of appeals in the same case.²⁶ In

²⁶/The subpoenas in this case, for example, were issued by the District Court for the District of Columbia (J.A. 76-79), where petitioners are headquartered. Petitioners chose to keep the proceedings in the Southern District of New York, where the action is pending, by moving in that District for a protective order pursuant to Fed. R. Civ. P. 26(c). Had they chosen instead to serve objections to the subpoena under Rule 45(d)(1), a motion to compel could have been brought only in the District of Columbia, *id.*, and an appeal from any ensuing order of contempt would have [Footnote 26 continued on next page]

any case that presented a close question as to subject matter jurisdiction, no party could be sure of his ability to obtain evidence by subpoena -- and no trial court could be sure of its ability to proceed to trial -- until this Court had ruled.

Adoption of petitioners' argument would be an open invitation to collusion between parties and friendly non-party witnesses to secure expedited review of jurisdictional rulings. Because civil contempt can be purged at any time by compliance and courts appear willing to grant stays of enforcement pending appeal, there would be no real risk to such disobedience. The result would be a gaping hole in the rule against interlocutory appeals and serious damage to

[Footnote 26 continued from previous page]
been brought in the District of
Columbia Court of Appeals. In re
Corrugated Antitrust Litigation, 620
F.2d 1086 (5th Cir. 1980).

its underlying policies of "deference . . . to the trial judge" and "promoti[on] of judicial administration."

Firestone Tire & Rubber Co. v. Risjord,
449 U.S. 368, 374 (1981).

Indeed, this case provides an excellent example of how the appeal from a contempt order can be used to circumvent the rule. First, the government, with petitioners' support as amici in the District Court and the Court of Appeals, unsuccessfully attempted to obtain appellate review of the denial of the motions to dismiss.²⁷ Petitioners, in the meantime, sought and agreed to a protective order, naturally leading the District Court to believe that, if the government's efforts failed, the documents would be produced. The government's

²⁷/The government twice sought certification under 28 U.S.C. § 1292(b) and petitioned for a writ of mandamus both in the Court of Appeals and in this Court.

failure, however, was merely the signal for petitioners to delay discovery further by seeking the identical relief.

As noted above, petitioners concede that their "sole" consideration in disobeying the discovery order was to get the District Court's prior ruling on standing "overturned on appeal." (J.A. 103) The government likewise acknowledges that petitioners' argument is essentially a replay of its own petitions for mandamus. The only difference, according to the government, is that now the issue is presented "in a direct appeal that is not burdened by the restrictions that attend the issuance of an extraordinary writ."²⁸ This position, if accepted, would create a new class of final orders in any case where jurisdiction is an issue and the defendant can

²⁸/Brief for the Federal Respondents in Support of Petition, 7.

persuade just one non-party witness, who takes no real risk, to defy a subpoena.²⁹

To preserve the rule against interlocutory appeals, the Court of Appeals in this case wisely applied to the District Court's determination the same presumption of validity and minimal scrutiny appropriate to petitions for an extraordinary writ:

In the instant case, though the issue of subject matter jurisdiction over the underlying lawsuit is a substantial question, the District Court cannot be said to be usurping power in determining that subject matter jurisdiction exists.

²⁹/Regardless of whether there has been actual collusion between petitioners and the government, it can scarcely be denied that they are -- and see themselves as -- strongly allied in interest. Indeed, petitioners argue that they are "the real targets of the suit." (Pet. Br. 25) This case, therefore, falls within the rule that "a substantial congruence of interests" between a party and a non-party will bar the latter's appeal of a contempt order. In *Re State of Washington v. Standard Oil of California*, 747 F.2d 1303, 1305 (9th Cir. 1984), cert. denied, 471 U.S. 1100 (1984) (Kennedy, J.).

(Pet. App. 19a) (emphasis added)³⁰

The standard of review adopted by the Court of Appeals successfully reconciles jurisdictional concerns with the federal courts' strong policy against piecemeal appeals and should be approved by this Court.

The instant petition and the appeal below are indistinguishable from the government's prior petitions for the same relief. While the USCC and NCCB are now petitioners instead of amici, their arguments and their interest in the case are unchanged. The issue is the same; so should be the result.

³⁰/See cases cited at note 25, supra, and United States v. United Mine Workers, 330 U.S. at 309 (Frankfurter, J., concurring) (contempt upheld unless court was "merely usurping judicial forms and facilities"). As Judge Newman observed, a similar standard is also applied to a collateral attack on a judgment entered after litigation of subject matter jurisdiction. (Pet. App. 19a, citing Nemaizer v. Baker, 793 F.2d 58, 64-66 (2d Cir. 1986)).

II.

Respondents Have Standing To Sue.

As shown in the previous section, petitioners cannot mount a "full-scale challenge to the correctness of the district court's exercise of [subject matter] jurisdiction." (Pet. App. 10a) The appropriate standard for this Court's inquiry is limited to whether the District Court's retention of jurisdiction amounts to a "clear usurpation of judicial power." As the Court of Appeals correctly held, the answer is no. (Pet. App. 19a)³¹

Even if this Court chooses to inquire more deeply into the merits of the District Court's decision, the result

³¹/Indeed, as shown in Point I, supra, any other conclusion would appear to be foreclosed by this Court's refusal last Term to grant the government's petition for mandamus (No. 86-162) or to review the denial of mandamus by the Court of Appeals (No. 86-157).

should be the same: the District Court properly sustained the standing of both the clergy and the "voter" or "political participant" respondents.

The constitutional requirements for standing under Article III of the Constitution are easily stated. Their application, however, is another matter.³²

Grounded in the "case or controversy" provisions of Article III of the Constitution, the standing doctrine requires a plaintiff to "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. 737, 751 (1984). In addition, the plaintiff

³²/As previously noted, the Court is required to accept as true all the material allegations of the amended complaint (J.A. 5-19) and the affidavits submitted by respondents in opposition to the motions (J.A. 28-66), and to construe these facts in the light most favorable to the respondents. See note 4 supra.

must satisfy "prudential" concerns which reflect "judicially self-imposed limits on the exercise of federal jurisdiction" under the separation of powers doctrine. Id.

Petitioners and the government (sometimes referred to collectively in this section as "petitioners") argue in various guises that the injuries alleged by respondents are not cognizable in law or sufficiently particularized or individualized to meet the injury in fact test, and that they are neither "fairly traceable" to the government's conduct nor "likely to be redressed by the requested relief." Petitioners also assert as grounds for dismissal the prudential limitation identified in Allen v. Wright "barring adjudication of generalized grievances more appropriately addressed in the representative branches." 468 U.S. at 751.

Petitioners, however, misconstrue the nature of respondents' injuries and ignore the fact that respondents' claims are founded upon constitutionally protected individual freedoms which the judiciary has long recognized it has a special duty to protect.

A. The Clergy Respondents Have Standing to Challenge an Establishment Clause Violation That Injures Them in the Practice of Their Ministries.

To confer standing, a plaintiff's injury must be "'distinct and palpable,'" Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979), and cannot be "'abstract' or 'conjectural' or hypothetical,'" Allen v. Wright, 468 U.S. 737, 751 (1984). It does not, however, have to be economic. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 486 (1982). The Court has repeatedly recognized that a wide range

of harms, including economic, aesthetic, environmental and spiritual, can constitute judicially cognizable injury in fact.³³

³³/See, e.g., *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. at 111-12 (denial of right to interracial association); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 73-74 (1978) (environmental and aesthetic consequences of pollution); *United States v. SCRAP*, 412 U.S. 669 (1973) and *Sierra Club v. Morton*, 405 U.S. 727 (1972) (diminution of aesthetic and environmental interests in enjoyment of natural resources); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 154 (1970) ("aesthetic, conservational and recreational" interests); *Abington School District v. Schempp*, 374 U.S. 203, 208-10 (1963) (spiritual values).

In *Allen v. Wright*, this Court reaffirmed that "stigmatizing injury" is the "sort of noneconomic injury [which] is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing." 468 U.S. at 755. The Court cited its unanimous decision in *Heckler v. Mathews*, 465 U.S. 728 (1984), where the Court stated that "discrimination itself, . . . by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, can cause

[Footnote 33 continued on next page]

Indeed, this Court has specifically held that a spiritual injury may be sufficient to confer standing:

A person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause.

Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 154 (1970) (citing Abington School District v. Schempp, 374 U.S. 203 (1963)).³⁴

[Footnote 33 continued from previous page]
serious noneconomic injuries. . . ."
465 U.S. at 739-40 (citation omitted).

³⁴/Non-economic, spiritual injuries that personally affect a plaintiff have often been recognized as a basis for standing. See, e.g., American Civil Liberties Union v. City of St. Charles, 794 F.2d 265 (7th Cir.), cert. denied, 107 S.Ct. 458 (1986) (standing to challenge city's display of cross); Hawley v. City of Cleveland, 773 F.2d 736 (6th Cir. 1985), cert. denied, 106 S.Ct. 1266 (1986) (standing to challenge sectarian chapel at public airport); American Civil Liberties Union v. Rabun County Chamber of Commerce, 698 F.2d 1098 (11th Cir. 1983) (standing to challenge display of cross on state-owned property).

As the District Court found, the clergy respondents in this case suffer personal injury of the type recognized by this Court, as the direct result of the IRS' unconstitutional subsidy and tacit endorsement of the Catholic Church. (Pet. App. 67a-68a)

The District Court grouped under the rubric of "clergy plaintiffs" five clergy members who are active spiritual leaders, ordained as rabbis or ministers by their respective religious bodies and employed by tax-exempt religious congregations, and one tax-exempt religiously-based organization. They are:

--Rabbi Israel Margolies, a rabbi in New York City (J.A. 43-44) until his death in February 1988;

-- Reverend Beatrice Blair, an Episcopal minister in New York City (J.A. 45-47);

-- Rabbi Balfour Brickner, a rabbi in New York City (J.A. 48-50);

-- Reverend Robert Hare, a Presbyterian minister in Scarborough, New York (J.A. 51-52);

-- Reverend Marvin G. Lutz, a Presbyterian minister in Jacksonville, Florida, and the Women's Center for Reproductive Health, also of Jacksonville, held by the District Court to be an extension of Reverend Lutz's ministry. (J.A. 53-55; Pet. App. 68a)

Petitioners argue that because the clergy respondents do not complain of IRS action specifically directed against them, they have not alleged sufficient personal injury to satisfy the injury in fact requirement for standing. (Pet. Br. 33) This argument, however, entirely misconstrues the nature of respondents' claim.

Respondents' complaint arises under the Establishment Clause. That Clause prohibits government promotion of religion or discrimination among religions,

regardless of whether individuals are actually compelled to adhere to the beliefs endorsed by the government. In the words of Justice Black:

The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.

Engel v. Vitale, 370 U.S. 421, 430 (1962).

Injuries to freedoms guaranteed by the Establishment Clause are thus different from injuries caused by violations of most other constitutional rights. The latter usually involve some sort of direct governmental coercion or action against the individuals suing. In an Establishment Clause claim, on the other hand, the challenged governmental action is the preferential treatment of parties other than the plaintiff.

Thus, direct governmental coercion is not a necessary element of a violation of the Establishment Clause. The injury is the governmental endorsement or discrimination itself, because any "denominational preference," Larson v. Valente, 456 U.S. 228, -245 (1982), necessarily denigrates the beliefs of those who disagree with the official preferred religion.³⁵

Governmental discrimination among religions, which is the essence of clergy respondents' claim, is the purest form of an Establishment Clause violation. "The clearest command of the Establishment

³⁵/Justice O'Connor has described the nature of the injury in these terms:

Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.

Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (concurring opinion).

Clause is that one religious denomination cannot be officially preferred over another." Id. at 244. To ensure "that every denomination would be equally at liberty to exercise and propagate its beliefs," the First Amendment forbids governmental regulation creating "an atmosphere of official denominational preference." 456 U.S. at 245.

Thus, as the Court has held, "the requirements for standing to challenge state action under the Establishment Clause . . . do not include proof that [plaintiffs'] particular religious freedoms are infringed." Abington School District v. Schempp, 374 U.S. 203, 224 n.9 (1963). Plaintiffs need show only that they are "directly affected by the laws and practices against which their complaints are directed." Id.³⁶

³⁶/Cf. Warth v. Seldin, 422 U.S. 490, 505 (1975):

When a governmental prohibition or restriction imposed on one party
[Footnote 36 continued on next page]

That requirement is clearly satisfied here. Unlike the plaintiffs in Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982), the clergy respondents here do not rely on the abstract injury common to all citizens that results when the government acts illegally. Rather, clergy respondents claim that as a direct result of a specific government violation they personally suffer distinct and concrete injuries arising from their individual professional and personal situations.

The work of the clergy respondents includes ministering to the needs of their churches and congregations, as well as seeking acceptance in the community at

[Footnote 36 continued from previous page] causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights.

large for their particular religious ideals and beliefs.

The clergy respondents are members of religious institutions and denominations that do not share the Catholic Church's theological abhorrence of abortion, but believe that termination of pregnancy is justifiable in some circumstances. In furtherance of their ministries, respondents are active in the abortion rights movement but under § 501(c)(3) must refrain from engaging in partisan political activities which they could otherwise employ to "propagate [their] beliefs", Larson, 456 U.S. at 245, and obtain greater public approval or acceptance of their teachings.³⁷

³⁷/Engaging in these prohibited activities would lead to the loss of tax-exempt status under § 501(c)(3), and make it more expensive and difficult for respondents and their congregations to carry on their religious missions.

Their Catholic brethren, on the other hand, have no such restrictions placed on them. The IRS has allowed Catholic clergy to electioneer -- to employ the tools of partisan politics to promote their anti-abortion theology and otherwise to exploit their tax-exempt status in the political arena -- in ways that are forbidden to the clergy respondents. Thus, in the daily practice of respondents' ministries, in their abilities to gain public acceptance of their religious beliefs and to minister to their congregations' particular needs, the government has denied respondents access to the same tools -- tacit endorsement of and substantial cash subsidies for partisan political activities -- that the government bestows on Catholic clergy.³⁸

³⁸/The two most important benefits of tax-exempt status under § 501(c)(3) are that the organization itself is exempt from income tax and donations
[Footnote 38 continued on next page]

The injury can be graphically illustrated by comparing the differences created by the IRS between the clergy respondents and their Catholic brethren across town (or the town square) during political campaigns that affect them both, such as the New York 1976 senatorial campaign or the 1984 presidential campaign.³⁹

[Footnote 38 continued from previous page]
to the organization are deductible on the donor's income, estate and gift tax returns. 26 U.S.C. §§ 170, 2055, 2522. This Court has held that these are the equivalent of cash grants to the organization and the donor. *Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983); see note 6, supra.

The additional benefits of § 501(c)(3) status are also substantial. See generally Houck, *With Charity For All*, 93 Yale L.J. 1415, 1429 (1984)

³⁹/Petitioners misstate respondents' injury when they claim that this suit involves a "minister in New York . . . challenging the tax exemption of the Archdiocese of San Antonio, Texas." (Pet. Br. 35) Rather, the case concerns clergy, such as the ministers in New York, who claim that they have been injured in their local political

[Footnote 39 continued on next page]

The churches and synagogues that employ the New York clergy respondents, Rabbi Margolies, Rev. Blair, Rabbi Brickner and Rev. Hare, like Catholic churches in New York, are tax-exempt under section 501(c)(3), and donations to these organizations are deductible on the tax returns of the donors.

Abortion is an important issue for both the New York clergy respondents and their Catholic counterparts. Both, as part of their respective ministries, preach to their congregations and counsel individual congregants on questions relating to abortion. Respondents, like many Catholic clergy, are active participants in the public debate on abortion.⁴⁰

[Footnote 39 continued from previous page]
communities by the IRS' favoritism of another religious establishment in that same local community, as well as by favoritism of that religion nationwide.

⁴⁰/Rev. Blair, for example, at the time the amended complaint was filed, was chair of the board of National

[Footnote 40 continued on next page]

The IRS' discriminatory enforcement of § 501(c)(3), however, restricts how the New York clergy respondents, compared to their Catholic counterparts across town, may seek public acceptance of their position in elections in which abortion rights is a major issue. Catholic priests, for example, are allowed by the IRS to funnel Church funds to, or to solicit tax-deductible donations for candidates they support. Catholic clergy

[Footnote 40 continued from previous page]
Abortion Rights Action League ("NARAL") and a member of the board of the New York City Metro Religious Coalition for Abortion Rights. (J.A. 45) Rabbi Brickner, in addition to but separate from his religious affiliation, was at the time of the filing of the amended complaint chairman of the national issues committee of the New York State Liberal Party, which sponsors candidates for election to public office (J.A. 49), including the United States Senate and the Presidency. Rev. Hare at that time was president of Religious Leaders for Free Choice of Greater Metropolitan New York. (J.A. 51)

may turn their sermons or their public statements into political endorsements.⁴¹

Clergy respondents, on the other hand, cannot use or raise tax-favored dollars for the candidates they support. They cannot use the power of their pulpits to seek votes.

The government, in short, blesses the partisan political activities of Catholic clergy with subsidies, simultaneously refusing to permit the clergy respondents living in the same communities and participating in the same public debate, to employ the same techniques to

⁴¹/In 1976, the Catholic Church in New York, according to the amended complaint, "donated substantial sums" to a group promoting the senatorial campaign of James Buckley. (J.A. 13) In 1984, then Archbishop O'Connor of New York publicly criticized vice-presidential candidate Geraldine Ferraro's position on abortion, N.Y. Times, Sept. 10, 1984, at A1, col. 8, shortly after the Archbishop had publicly stated that Catholics could not in good conscience vote for candidates who supported abortion. N.Y. Times, Aug. 4, 1984, at A1, col. 3-4.

counteract the Catholic clergy's government-subsidized activities.⁴²

Thus respondents are unlike the plaintiffs in Allen v. Wright, who could not claim that they personally had been subjected to discrimination as a result of the government's policy. 468 U.S. at 746.

The difference between clergy respondents and the plaintiffs in Allen is made even more apparent when one examines the second and third elements of the

42/The engendering of "political division along religious lines is one of the principal evils" the Religion Clauses were adopted to prevent. Lemon v. Kurtzman, 403 U.S. 602, 622 (1971). In the words of Justice Harlan,

[G]overnmental involvement . . . may . . . engender a risk of politicizing religion. . . . [R]eligious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortion. Yet history cautions that political fragmentation on sectarian lines must be guarded against.

Walz v. Tax Commission, 397 U.S. 664, 695 (1970) (Harlan, J., concurring).

standing test. In Allen, the Court held that plaintiffs' alternate ground for standing, that the government's actions had diminished their children's ability to attend racially integrated schools, was not "fairly traceable" to the challenged government conduct. The Court noted that it was "entirely speculative" whether a change in the government policy would increase the opportunity for plaintiffs' children to attend integrated schools. 468 U.S. at 757, 758.

By contrast, the clergy respondents here are personally denied the opportunity to engage in partisan political activity and to foster their respective religious missions with the same official status and on the same statutory terms and conditions as another tax-exempt religious entity. The injury is caused solely by a "specifically identifiable governmental violation of law," 468 U.S. at 759, namely the IRS' preference of the

Catholic Church over the clergy respondents. Injunctive relief requiring the IRS to end its preferential treatment of the Catholic Church will redress respondents' injury. Thenceforth, respondents and their Catholic brethren would be treated equally by the government. (Pet. App. 69a, 96a)⁴³

43/It does not matter that respondents seek to end the preferential treatment of the Catholic Church by removing the benefits given to the Church, rather than by procuring the benefits for themselves. This Court has recently reaffirmed that "the right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated against." *Heckler v. Mathews*, 465 U.S. 728, 739 (1984). As Justice Brennan wrote for the Court, paraphrasing Justice Brandeis:

[W]hen the "right invoked is that of equal treatment," the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.

Id. at 740 (quoting *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931) (emphasis in original) (footnote omitted)).

Accordingly, the District Court's determination that the clergy respondents have standing to maintain this action is correct.⁴⁴

B. The "Political Participant" Respondents Have Standing to Challenge the Government's Distortion of the Political Process.

The second category of plaintiffs held by the District Court to have standing are the "political participant" respondents. They include the seventeen individual respondents (including the clergy respondents) and three tax-exempt organizations suing on behalf of their respective members. (Pet. App. 70a)⁴⁵

⁴⁴/As the arguments for redressability are similar for both classes of respondents, the discussion of redressability that appears in the section on "voter" respondents, *infra* at 89-95, should be read as applicable to clergy respondents as well.

⁴⁵/The organizations are Abortion Rights Mobilization, Inc. ("ARM"), National Women's Health Network, Inc. ("NWHN"), [Footnote 45 continued on next page]

The individual respondents reside or work in different parts of the country including areas where specific violations of § 501(c)(3) alleged in the amended complaint have occurred.⁴⁶

[Footnote 45 continued from previous page] and Long Island National Organization for Women-Nassau, Inc. ("Nassau-NOW"). The organizations are ARM and NWHN are both tax-exempt under § 501(c)(3). Nassau-NOW is tax-exempt under § 501(c)(4). The primary difference between a (c)(3) and a (c)(4) organization is that contributions to the former are tax deductible by the donor, while contributions to the latter are not, 26 U.S.C. § 170. Neither group may engage in partisan political activities. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii); see generally House Hearings 101-02 (exhibits to statement of Lawrence B. Gibbs, Commissioner of Internal Revenue).

46/The individual respondents live or work in New York City (J.A. 28, 35, 43, 45, 48) and State (J.A. 31, 51, 56, 57, 58, 63, 65), Massachusetts (J.A. 33), New Jersey (J.A. 43), Pittsburgh, Pennsylvania (J.A. 60, 61), and Florida (J.A. 53). ARM and NWHN are national organizations based in New York and Washington, D.C., respectively (J.A. 28, 37); Nassau-NOW is headquartered in Nassau County, New York. (J.A. 41)

All the individual respondents are voters, most of whom are active in the abortion rights movement. (J.A. 28-42, 45-55, 63-66) Several respondents are substantial contributors to political campaigns on behalf of pro-choice candidates (J.A. 31-36, 38-39, 48-50, 63-66) or contributors to tax-exempt organizations that support abortion rights but cannot and do not engage in electioneering (J.A. 31-36, 38-39, 63-66). Other respondents are Catholic laity opposed to the Church's illegal use of the contributions. (J.A. 56-62) One respondent (Brickner) was, at the time the lawsuit commenced, national issues director of a political party in New York State (J.A. 49-50), and one (DeCrow) was a former candidate for political office who anticipates running again. (J.A. 63-64)

In Baker v. Carr, 369 U.S. 186, 208 (1962), this Court recognized that those who "assert[] 'a plain, direct and

adequate interest in maintaining the effectiveness of their votes," state a cognizable injury upon which they have standing to sue. Such plaintiffs challenge governmental action that "plac[es] them in a position of constitutionally unjustifiable inequality vis-a-vis [favored] voters," id. at 207, and are "not merely [claiming] 'the right, possessed by every citizen, to require that the Government be administered according to the law,'" id. at 208.

In Reynolds v. Sims, 377 U.S. 533, 562 (1964), the Court noted that "the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." It is now accepted that "the substantive right to participate on an equal basis with other qualified voters [in the] electoral process," Lubin v. Panish, 415 U.S. 709, 713 (1974) (quoting San Antonio School District v. Rodriguez, 411 U.S. 1, 59 n.2 (1973))

(Stewart, J., concurring)), is a basic constitutional right, secured by the First and Fourteenth Amendments.

Anderson v. Celebrezze, 460 U.S. 780, 786 & n.7 (1983).

The political participant respondents state a cognizable violation of this fundamental right, namely, the distortion of the political process caused by the government's subsidy of the partisan political activities of one participant in the political process, the Catholic Church, but not others, including the respondents.

The government's actions make it much more expensive for respondents to donate money to political campaigns and much more difficult for them to raise funds from others, as compared to campaign contributors or candidates with Catholic Church backing. Because respondents' political contributions (or contributions to respondents' campaigns)

are not deductible, it costs respondents considerably more to give \$1,000 to a candidate, for example, than it costs a donor to make a similar contribution to a candidate by means of a tax-exempt, tax-deductible contribution to the Catholic Church. Candidates backed by the Church, therefore, can raise funds more easily than the respondents or the candidates they support.

Respondents are harmed further because the government permits the Catholic Church, but not respondents, to use the power and prestige arising from the Church's standing in the community to partisan advantage, and to employ the Church's organization and membership structure to support or oppose political candidates.⁴⁷

⁴⁷/That many people have suffered a similar injury does not negate the standing of one who has suffered a direct and personal injury. See United States v. SCRAP, 412 U.S. 669, 686 (1973); Sierra Club v. Morton, 405 [Footnote 47 continued on next page]

These injuries are caused, not by the partisan political activity of the Catholic Church, but by government action -- or, more accurately, inaction -- with respect to that political activity. Respondents' injuries can be eliminated by an order requiring the government to end its favoritism toward the Catholic Church, thus eliminating the government-caused distortion of the political process. If thereafter the Catholic Church continued to engage in partisan political activities, it would have to do so on the same basis as respondents -- that is, by foregoing its tax-exempt status and by financing such activities without tax-deductible dollars.

[Footnote 47 continued from previous page]
U.S. 727, 734-35 (1972). "[S]tanding principles do not require that a party be the most grievously injured, only that he be 'among the injured.'" Moore v. United States House of Representatives, 733 F.2d 946, 952 (D.C. Cir. 1984), cert. denied, 105 S.Ct. 779 (1985).

Respondents do not challenge the right of the Catholic Church to support candidates. They argue only that the government's support for and subsidy of Catholic Church electioneering activity is unlawful and unconstitutional. It is irrelevant, therefore, whether the Church will continue to be active politically or if its members will increase their donations. If the government applies to the Catholic Church the same standards regarding political use of tax-exempt, tax-deductible dollars as it applies to respondents, the governmentally caused arbitrary inequality of which respondents complain will have been eliminated.

Thus, neither Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976), nor Allen v. Wright, 468 U.S. 737 (1984), upon which petitioners rely, is on point. In Simon, plaintiffs' alleged injury was their inability, as indigent patients, to obtain hospital

services without charge. They could not show, however, that a change in the IRS regulations they challenged would result in a change in the hospitals' policies toward indigent patients, as those policies were determined by many factors, only one of which was before the Court. The Court, therefore, held that the respondents could not meet the causation or redressability requirements for standing.

In Allen, plaintiffs' injury was the diminished ability to obtain for their children racially integrated schooling. Because plaintiffs could not show that a change in the IRS policy would alter the segregated schools' admissions policies, which were determined independently, the line of causation between plaintiffs' injury and the challenged action was too attenuated to support standing.

In the case at bar, however, the injury to respondents is not the Catholic

Church's political activities per se, but the government's subsidy of those activities. If that tax benefit is removed -- by an order requiring equal enforcement of the tax code -- the cause of respondents' injury will also be removed.⁴⁸

The other cases relied upon by petitioners can also be distinguished on this basis. Respondents do not seek court interference with discretionary federal decisions nor are they concerned with the outcome of any particular election.⁴⁹

48/As the District Court held (Pet. App. 99a):

The judicially cognizable injury in Allen was segregated schooling which was neither created nor remediable by IRS action alone. The injury alleged in ARM is unequal footing in the political arena, a condition completely traceable and within the control of the IRS.

49/Unlike this case, the plaintiffs' evident purpose in Winpsinger v. Watson, 628 F.2d 133 (D.C. Cir.), cert. denied, 446 U.S. 929 (1980) was to secure the presidential nomination of their candidate. They also challenged virtually every

[Footnote 49 continued on next page]

Respondents ask only that the government's thumb be removed from the scales so that the electoral process can take place without discriminatory or unconstitutional governmental interference.

Political participant respondents, thus, are like the candidates and campaign contributors who were held to have standing to challenge portions of the congressional franking statute:

Plaintiffs respond by contending that regardless of electoral outcomes, the interest in a fair electoral process that they assert is directly affected by the defendants' actions under the franking statute.

[Footnote 49 continued from previous page] discretionary decision made by the executive branch. The requested relief here is the termination of a specific unconstitutional act of religious favoritism by the federal government -- not a particular electoral result. See *McMichael v. County of Napa*, 709 F.2d 1268, 1273 (9th Cir. 1983) (Kennedy, J., concurring) ("[T]he improper election procedure, whatever its effect on the outcome, forces participation in a constitutionally defective process. The appellant does have standing to make this argument.")

Moreover, plaintiffs allege that they suffer particularized harms distinct from those suffered by the citizenry at large. Under this characterization of the complaint, the causation requirements of the Warth [v. Seldin] and Winpisinger cases are not in issue, because the asserted harm is the franking statute and defendants' actions thereunder. There is no third party action here complicating the issue. Plaintiffs are directly harmed by defendants' actions.

Common Cause v. Bolger, 512 F.Supp. 26, 29 (D.D.C. 1980) (three-judge court) (emphasis in original).⁵⁰

Petitioners argument that the respondents' injury is not redressable

⁵⁰/Petitioners claim that a finding of standing in this case would open the door to a multitude of "competitive injury" standing suits is off the mark. (Pet. Br. 38) This case concerns the First Amendment requirement imposed by our Founding Fathers that government not distort the political process in favor of one religion over another. Recognition of standing for significant injuries to constitutional freedom does not in any way apply to claims of competitive economic injury such as those raised in American Society of Travel Agents v. Blumenthal, 566 F.2d 145 (D.C. Cir. 1977), cert. denied, 435 U.S. 947 (1978).

because petitioners, who are not parties to this action and therefore not bound by its outcome, can later challenge any action taken against them by the IRS (Pet. Br. 42 n.28), is without merit. The injuries suffered by respondents flow directly from the IRS' failure to take any enforcement action against the Church. If the IRS is required to take enforcement action, the injury will be redressed because the IRS will be treating the Church no differently than any other tax-exempt body. That the Church may object is of no consequence. Moreover, it is entirely speculative whether the Church will object to any action the IRS may be ordered to take. See Orr v. Orr, 440 U.S. 268 (1979).

C. Prudential Considerations Do Not Argue Against Recognizing Standing For Respondents.

Petitioners argue that even if respondents have suffered a cognizable injury, standing should nonetheless be denied in deference to prudential and separation of power concerns. Petitioners, however, distort respondents' claims when they portray resolution of this case as involving massive judicial intervention into complex matters of bureaucratic administration. Respondents invoke only the traditional adjudicatory powers of the federal judiciary, the exercise of which would require minimal intervention into the operations of the executive. Furthermore, separation of power principles argue in favor of judicial resolution of respondents' claims.

1. The Remedy Requested Is Unintrusive.

The minimal level of judicial intrusion required to resolve this dispute

clearly distinguishes this case from Allen v. Wright, 468 U.S. 737 (1984). In Allen, plaintiffs sought to use the federal judiciary to force the IRS to rewrite detailed regulations governing the enforcement of the policy against providing tax support to segregated schools.

The Court found that the plaintiffs "[did] not challenge particular identified unlawful IRS actions," 468 U.S. at 766, but rather sought the "restructuring of the apparatus established by the Executive Branch," id. at 761.⁵¹

By contrast, respondents here assert a much more limited claim. They do not challenge a general regulatory scheme or seek to compel the rewriting of a set of regulations. The relevant cong-

⁵¹/The Allen Court did state, however, that its holding "[did] not rest on the more general proposition that no consequence of the allocation of administrative enforcement resources is judicially cognizable." Id. at 761 n.26.

ressional policy they seek to enforce is crystal clear.⁵² Their enforcement would not involve petitioners' parade of bureaucratic horrors; it is the everyday business of the IRS. Respondents ask only that the IRS apply the existing statute and regulations evenly to all religious groups.^{52a}

2. Prosecutorial Discretion Does Not Bar Respondents' Suit.

Petitioners rely on Heckler v. Chaney, 470 U.S. 821 (1985), to argue that executive enforcement decisions are inappropriate for judicial resolution. (Pet. Br. 42-43) Chaney, however, is not applicable -- even as an analogy -- to the case at hand.

52/ Nor is there any ambiguity about the criteria to be applied. Section 501(c)(3) contains an absolute prohibition against partisan political activity by tax-exempt organizations. In writing this statute, Congress has spoken "[w]ith undeniable clarity." Bob Jones University v. United States, 461 U.S. 574, 613 (1983) (Rehnquist, J., dissenting).

52a/ As the District Court put it:
Although the complaint implicates social policy issues, it does not call for judicial selection of an appropriate policy. Congress already has made that choice and set out the correct policy in § 501(c)(3); plaintiffs ask only for a judicial determination of whether defendants have observed Congress's commands concerning paying taxes and engaging in political activity.
(Pet. App. 79a, 101a-102a).

In Chaney this Court considered the reviewability of agency enforcement decisions by construing the statutory language of the "committed to agency discretion" provision of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2). The considerations relevant to that statutory inquiry do not apply to a case alleging violations of the plaintiffs' fundamental constitutional rights.⁵³ The Court specifically noted that its holding did not apply to or address constitutional injuries, 470 U.S. at 838, or cases involving (as here) conscious or intentional patterns of agency non-enforcement. Id. at 832 n.4; see also id. at 839 (Brennan, J., concurring) (deference not appropriate where "agency engages in a pattern of

⁵³/In Chaney itself, the complaining parties did not allege that the agency's non-enforcement caused an injury to any independent statutory or constitutional interest the parties had.

non-enforcement of clear statutory language").⁵⁴ Particularly in light of the serious nature of respondents' constitutional injuries, "prosecutorial discretion" is an inappropriate basis for denying standing in this case.

3. Separation of Powers Considerations Favor Standing.

In Allen this Court held that separation of powers principles have "a role in defining [standing] requirements." 468 U.S. 761 n.26. The principles should be seen as guideposts to understand, and not simply to limit,

⁵⁴/As respondents challenge on constitutional grounds the failure of the government properly to enforce the statute, they in effect are claiming that the government exceeded the permissible bounds of prosecutorial discretion. Surely, the mere possibility that the government may defend its actions by claiming prosecutorial discretion should not rise to the level of an insurmountable jurisdictional obstacle to suit. Such a holding would effectively insulate the executive branch from judicial scrutiny any time the agency being sued waives a red flag of prosecutorial discretion.

standing. As this Court has consistently held:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943).⁵⁵

The case at hand presents a situation in which the actions of the executive branch taint the political process by which the representative branches are elected. Moreover, respondents challenge the government's grant of tax-exempt

⁵⁵/See Davis v. Passman, 442 U.S. 228, 252 n.1 (1979) (Powell, J., dissenting) ("[T]he federal courts have a far greater responsibility under the Constitution for the protection of those rights derived directly from it, than for the definition and enforcement of rights created solely by Congress.")

status to a religious organization which is then permitted to use the subsidy to help put in office those who would continue the exemption. This presents perhaps the greatest danger the Establishment Clause was designed to prevent: a mutually supportive relationship between government and a particular religion.

Respondents should not be expected to seek relief from those who have benefitted from the challenged actions. Separation of powers principles argue here for the independent branch of government to provide a judicial forum to hear the merits of respondents' claims.⁵⁶

⁵⁶/To rely on prudential notions of separation of powers would be peculiarly inappropriate where, as here, the infringement involves specific administrative activity which distorts and "restricts those political processes which can ordinarily be expected to bring about [relief]" United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); see also J. Ely, Democracy and Distrust: A Theory of Judicial Review 183 (1980) ("constitutional law appropriately [Footnote 56 continued on next page]

Accordingly, the District Court's decisions on standing are eminently correct under any standard of review, and certainly cannot be said to constitute the usurpation of power.

[Footnote 56 continued from previous page] exists for those situations where representative government cannot be trusted, not those where we know it can").

As the Fifth Circuit held in a similar context:

We do not believe that prudential notions of self-restraint in the area of standing are properly invoked in cases involving the dilution of an individual's fundamental voting rights: when a complaint alleges injury stemming from a clogged democratic process, it would be anomalous to require the plaintiff to seek relief from political institutions.

O'Hair v. White, 675 F.2d 680, 689 (5th Cir. 1982) (en banc).

Conclusion

The judgment of the Court of Appeals
should be affirmed.

Respectfully submitted,

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